



34 CFR Parts 668, 600, and 602

DEPARTMENT OF EDUCATION

[Docket ID ED-2018-OPE-0076, ED-2018-OPE-0027]

RIN 1840-AD26, 1840-AD36, 1840-AD37, 1840-AD38

Student Assistance General Provisions, Federal Family
Education Loan Program, and William D. Ford Federal Direct
Loan Program; Student Assistance General Provisions, The
Secretary's Recognition of Accrediting Agencies, The
Secretary's Recognition Procedures for State Agencies;
Distance Education and Innovation; Corrections.

AGENCY: Office of Postsecondary Education, Department of
Education.

ACTION: Final rule; technical corrections.

SUMMARY: The Department of Education (Department or we)
corrects the text in regulations issued under the Higher
Education Act of 1965, as amended (HEA) and published in
the *Federal Register* on: September 23, 2019, for provisions
relating to Borrower Defense to Repayment and Financial
Responsibility; November 1, 2019, for provisions relating
to Accreditation, State Authorization, and the Student
Assistance General Provisions; and September 2, 2020, for
provisions relating to Distance Education and Innovation,
Institutional Eligibility, and the Student Assistance
General Provisions.

DATES: These corrections are effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The incorporation by reference of certain publications listed in this document is approved by the Director of the *Federal Register* as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Gregory Martin, 400 Maryland Avenue SW, room 2C-136, Washington DC 20202. Telephone: (202) 453-7535. Email: Gregory.Martin@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Incorporation by Reference. In § 668.172(c)(1) of this correction, we reference the following accounting standard: Accounting Standards Codification (ASC) 205. ASC 205 provides standards on the presentation of financial statements. In § 668.23(d)(1), we reference the following accounting standard: Accounting Standards Codification (ASC) 850. ASC 850 provides for accounting and reporting issues concerning related party transactions and relationships. These standards are available at www.fasb.org, registration required.

Summary of Corrections

The Department's Borrower Defense to Repayment Rule, published in the *Federal Register* on September 23, 2019, (84 FR 49788) contains the following errors:

1. The regulations in 34 CFR 668.175(c) mistakenly suggest that an institution that is not financially responsible may participate as a financially responsible institution by providing any of the financial protections included in 34 CFR 668.175(h). However, under Section 498(c) of the HEA, some options included in 34 CFR 668.175(h) do not make an institution financially responsible. To conform the regulations to the provisions of the HEA, the reference in 34 CFR 668.175(c) is corrected to refer only to the surety provisions in 34 CFR 668.175(h) (2) (i).

2. The audit requirements in 34 CFR 668.23(d) do not specify that the Supplemental Schedule is part of the audited financial statements submission, as required under 34 CFR 668.172(a) and Section 2 of Appendix A and B to subpart L of the General Provisions regulations, and do not cite the current audit guidance and accounting standards. This correction updates 34 CFR 668.23(d).

3. The financial ratios in 34 CFR 668.172(b) do not conform to the related revisions to the accounting terminology and to the definition of terms as specified in Appendices A and B to subpart L of the General Provisions regulations. This correction updates 34 CFR 668.172(b).

4. Two of the terms described in 34 CFR 668.172(c)(1), "extraordinary gains and losses", and "income or losses from discontinued operations" do not reflect changes in accounting standards. The accounting standards eliminated "extraordinary gains and losses" and modified the requirements for "income and losses from discontinued operations." This correction updates 34 CFR 668.172(c) to conform to accounting standards.

The Department's Accreditation and State Authorization Rule, published in the *Federal Register* on November 1, 2019, (84 FR 58834) contained the following errors:

1. The regulations in 34 CFR 602.32(h)(4)(ii) relating, in part, to the disposition of an accrediting agency's recognition conflict with related provisions in 34 CFR 602.34, Advisory Committee meetings, and 34 CFR 602.36, Senior Department Official's decision. Under 34 CFR 602.23(h)(4)(iii), Department staff have the option to recommend that the senior Department official renew an agency with compliance reporting, but that option is not aligned with 34 CFR 602.34(g) and 34 CFR 602.36(e), which require continuing recognition pending submission of a compliance report. This correction updates 34 CFR 602(h)(4)(ii) to conform with the provisions in 602.34(g) and 602.36(e). We note that we acknowledged that 34 CFR 602.32(h)(4)(ii) did not align with 602.36(e) at page 27437 of the proposed rule (84 FR 27404) and it was an oversight

that we did not correct this inconsistency at that time. Additionally, allowing renewal under 34 CFR 602.32(h)(4)(ii), when there are noncompliant issues would violate section 496b(d) of the HEA (20 U.S.C. 1099b), which provides that no accrediting agency or association may be determined by the Secretary to be a reliable authority, unless the agency or association meets criteria established by the Secretary.

2. The eligible program regulations in 34 CFR 668.8(d)(4)(i) were not updated to conform to a related revision to 34 CFR 602.11. The amendment to § 602.11 revised the requirements for establishing the geographic area of an accrediting agency's activities that may cause accrediting agencies previously defined as "regional agencies" to be defined instead as agencies whose activities extend throughout the United States. This correction updates 34 CFR 668.8(d)(4)(i) to conform with the current provisions in 34 CFR 602.11 by referring to accrediting agencies that were defined as regional areas on October 1, 2007 rather than referring to agencies that were previously defined as "regional."

3. The provisional certification provisions in 34 CFR 668.13(c)(2)(i) erroneously reference paragraph (c)(1)(i) instead of paragraph (c)(1)(i)(A). The correction updates 34 CFR 668.13(c)(2)(i) with the correct cross-reference

applicable to institutions seeking initial participation in the Title IV, HEA programs.

4. The provisional certification provisions in 34 CFR 668.13(c)(2)(ii) erroneously reference "paragraphs (c)(1)(ii), (iii), (iv) or (e)(2)" instead of referencing "paragraphs (c)(1)(i)(B), (C), (D) or (c)(1)(ii)." The correction updates 34 CFR 668.13(c)(2)(ii) with the correct cross-references.

5. The provisional certification provisions in 34 CFR 668.13(c)(2)(iii) erroneously reference paragraph (c)(1)(v) instead of paragraph (c)(1)(i)(E). The correction updates 34 CFR 668.13(c)(2)(iii) with the correct cross-reference.

6. The provisional certification provisions in 34 CFR 668.13(c)(1)(i)(E) erroneously reference 34 CFR part 603 instead of 34 CFR part 602. The correction updates 34 CFR 668.13(c)(1)(i)(E) with the correct cross-reference.

The Department's Distance Education and Innovation Rule, published in the *Federal Register* on September 2, 2020, (85 FR 54742) contained the following errors:

1. The amendatory instructions at the end of the rule mistakenly instructed the Office of the Federal Register to revise § 600.10(c)(1)(iii) with language that was supposed to amend paragraph (c)(1)(ii). Consequently, § 600.10(c)(1)(ii) was not amended and the substance of § 600.10(c)(iii) was instead removed from the regulations. This correction restores the text in paragraph (c)(1)(iii)

relating to the Secretary's approval of short-term programs and revises paragraph (c)(1)(ii). These changes ensure that the language in § 600.10(c) reflects the language that the negotiated committee reached consensus on. For more information about the substance of the amendment to § 600.10(c)(2)(ii), please see discussion of this change in the Department's April 2, 2020, notice of proposed rulemaking (85 FR 18650).

2. The accrediting agency regulations under 34 CFR 602.22(a)(1)(ii)(J) were not updated to conform to a related change made to the written arrangement provisions under 34 CFR 668.5(c)(3)(ii)(A). Current § 668.5(c)(3)(ii)(A) allows an ineligible institution or organization to provide more than 25 percent but less than 50 percent of an educational program in accordance with 34 CFR 602.22(a)(1)(ii)(J). However, accrediting agency approval of such an arrangement is required under 34 CFR 602.22(a)(1)(ii)(J). Notably, the negotiated rulemaking committee for the Distance Education and Innovation Rule reached consensus on the revisions to current § 668.5(c)(3)(ii)(A). This correction updates 34 CFR 602.22(a)(1)(ii)(J) to align with § 668.5(c)(3)(ii)(A), which is the language that the negotiated rulemaking committee agreed to.

Waiver of Proposed Rulemaking, Negotiated Rulemaking and
Delayed Effective Date

In accordance with the Administrative Procedure Act, 5 U.S.C. 553, the Department generally offers interested parties the opportunity to comment on proposed regulations. However, the APA provides that an agency is not required to conduct notice-and-comment rulemaking when the agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b) (B)). There is good cause to waive rulemaking here as unnecessary.

Rulemaking is "unnecessary" in those situations in which "the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001), quoting U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1947) and South Carolina v. Block, 558 F. Supp. 1004, 1016 (D.S.C. 1983). However, the regulatory changes in this document are necessary to correct errors and to make routine technical updates. Thus, the Department has determined that publication of a proposed rule is unnecessary under 5 U.S.C. 553(b) (B).

In addition, under section 492 of the HEA (20 U.S.C. 1098a), all regulations proposed by the Department for programs authorized under title IV of the HEA are subject to negotiated rulemaking requirements. Section 492(b) (2)

of the HEA provides that negotiated rulemaking may be waived for good cause when doing so would be "impracticable, unnecessary, or contrary to the public interest." There is likewise good cause to waive the negotiated rulemaking requirement in this case, since, as explained above, notice and comment rulemaking is unnecessary.

The APA generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d)(3)). As previously stated, because the final regulations correct errors and make routine technical updates, there is good cause to waive the delayed effective date in the APA and make the final regulations effective upon publication.

Regulatory Flexibility Act Certification

The Regulatory Flexibility Act does not apply to this rulemaking because there is good cause to waive notice and comment under 5 U.S.C. 553.

Paperwork Reduction Act of 1995

The final regulations do not create any new information collection requirements.

Intergovernmental Review

The Student Assistance General Provisions, the Secretary's Recognition of Accrediting Agencies, and the Secretary's Recognition Procedures for State Agencies are

subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for these programs.

Assessment of Educational Impact

Based on our own review, we have determined that the final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Federalism Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule may have federalism implications.

Accessible Format: On request to the program contact person listed under FOR FURTHER INFORMATION CONTACT,

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List of Subjects

34 CFR Part 600

Colleges and universities, Foreign relations, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

34 CFR Part 602

Reporting and recordkeeping requirements.

34 CFR Part 668

Administrative practice and procedure, Aliens, Colleges and universities, Consumer protection, Grant programs-education, Incorporation by reference, Loan programs-education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

Nasser H. Paydar,
*Assistant Secretary for
Postsecondary Education.*

For the reasons discussed in the preamble, the Secretary of Education amends 34 CFR parts 600, 602, and 668 by making the following technical corrections:

**PART 600 - INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER
EDUCATION ACT OF 1965, AS AMENDED**

1. The authority citation for part 600 continues to read as follows:

Authority: 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c, unless otherwise noted.

2. Section 600.10 is amended by revising paragraphs (c)(1)(ii) and (iii) and the OMB control number at the end of the section to read as follows:

**§ 600.10 Date, extent, duration, and consequence of
eligibility**

* * * * *

(c) * * *

(1) * * *

(ii) For the first direct assessment program under 34 CFR 668.10 offered at each credential level, and for a comprehensive transition and postsecondary program under 34 CFR 668.232, obtain the Secretary's approval.

(iii) For an undergraduate program that is at least 300 clock hours but less than 600 clock hours and does not admit as regular students only persons who have completed the equivalent of an associate degree under 34 CFR 668.8(d)(3), obtain the Secretary's approval.

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(Approved by the Office of Management and Budget under control number 1845-0012)

PART 602 - THE SECRETARY'S RECOGNITION OF ACCREDITING AGENCIES

3. The authority citation for part 602 continues to read as follows:

Authority: 20 U.S.C. 1099b, unless otherwise noted.

4. Section 602.22 is amended by revising paragraph (a)(1)(ii)(J) to read as follows:

§ 602.22 Substantive change

* * * * *

(a) * * *

(1) * * *

(ii) * * *

(J) Entering into a written arrangement under 34 CFR 668.5 under which an institution or organization not certified to participate in the title IV, HEA programs offers more than 25 percent but less than 50 percent of one or more of the accredited institution's educational programs.

* * * * *

5. Section 602.32 is amended by revising paragraph (h) (4) (ii) to read as follows:

§ 602.32 Procedures for Department review of application for recognition or for change in scope, compliance reports, and increases in enrollment.

* * * * *

(h) * * *

(4) * * *

(ii) Recommending that the senior Department official approve, continue recognition with a compliance report—to be submitted to the Department within 12 months, continue recognition with a compliance report to be submitted to the Department with a deadline in excess of 12 months based on a finding of good cause and extraordinary circumstances, approve with monitoring or other reporting requirements, or deny, limit, suspend, or terminate recognition; and

* * * * *

**PART 668 - STUDENT ASSISTANCE GENERAL PROVISIONS UNDER THE
HIGHER EDUCATION ACT OF 1965, AS AMENDED**

6. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1001-1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c-1, 1221-3, and 1231a, unless otherwise noted

7. Section 668.8 is amended by revising paragraph (d) (4) (i) to read as follows:

§ 668.8 Eligible program

* * * * *

(d) * * *

(4) * * *

(i) Is provided by an institution that is accredited by a recognized accrediting agency or association that was defined as a regional accrediting agency or association on October 1, 2007, and has held such accreditation since October 1, 2007, or earlier; and

* * * * *

8. Section 668.13 is amended by revising paragraphs (c) (1) (i) (E) and (c) (2) (i) through (iii) and the OMB control number at the end of the section to read as follows:

§ 668.13 Certification procedures.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(E) The institution is a participating institution that was accredited or preaccredited by a nationally recognized accrediting agency on the day before the Secretary withdrew the Secretary's recognition of that agency according to the provisions contained in 34 CFR part 602; or

* * * * *

(2) * * *

(i) Not later than the end of the first complete award year following the date on which the Secretary provisionally certified the institution under paragraph (c)(1)(i)(A) of this section;

(ii) Not later than the end of the third complete award year following the date on which the Secretary provisionally certified the institution under paragraphs (c)(1)(i)(B), (C), and (D) or paragraph (c)(1)(ii) of this section; and

(iii) If the Secretary provisionally certified the institution under paragraph (c)(1)(i)(E) of this section, not later than 18 months after the date that the Secretary withdrew recognition from the institution's nationally recognized accrediting agency.

* * * * *

(Approved by the Office of Management and Budget under control number 1845-0022)

9. Section 668.23 is amended by:

- a. Revising paragraph (d) (1);
- b. Adding paragraph (i);
- c. Revising the OMB control number at the end of the section; and
- d. Removing the authority citation at the end of the section.

The revisions and addition read as follows:

§ 668.23 Compliance audits and audited financial statements.

* * * * *

(d) * * *

(1) *General.* To enable the Secretary to make a determination of financial responsibility, an institution must, to the extent requested by the Secretary, submit to the Secretary a set of financial statements for its latest complete fiscal year, as well as any other documentation the Secretary deems necessary to make that determination. Financial statements submitted to the Secretary must include the Supplemental Schedule required under § 668.172(a) and Section 2 of Appendix A and B to subpart L of this part, and must be prepared on an accrual basis in accordance with generally accepted accounting principles, and audited by an independent auditor in accordance with

generally accepted government auditing standards, issued by the Comptroller General of the United States and other guidance contained in 2 CFR Part 200—Uniform Administrative Requirements, Cost Principles, And Audit Requirements For Federal Awards; or in audit guides developed by, and available from, the Department of Education's Office of Inspector General, whichever is applicable. As part of these financial statements, the institution must include a detailed description of related entities based on the definition of a related entity as set forth in Accounting Standards Codification (ASC) 850. The disclosure requirements under this provision extend beyond those of ASC 850 to include all related parties and a level of detail that would enable the Secretary to readily identify the related party. Such information may include, but is not limited to, the name, location and a description of the related entity including the nature and amount of any transactions between the related party and the institution, financial or otherwise, regardless of when they occurred.

* * * * *

(i) *Incorporation by reference.* The material listed in this paragraph (i) is incorporated by reference into this section with the approval of the Director of the *Federal Register* under 5 U.S.C. 552(a) and 1 CFR part 51. This incorporation by reference (IBR) material is available for inspection at U.S. Department of Education and at the

National Archives and Records Administration (NARA).

Contact U.S. Department of Education at: Office of the
General Counsel, 400 Maryland Avenue SW, room 2C-136,
Washington DC 20202; phone: (202) 401-6000;

<https://www2.ed.gov/about/offices/list/ogc/index.html?src=o>

c. For information on the availability of this material at
NARA, contact the Office of the Federal Register - email:
fr.inspection@nara.gov; website: [www.archives.gov/federal-
register/cfr/ibr-locations.html](http://www.archives.gov/federal-register/cfr/ibr-locations.html). The material may be
obtained from the Financial Accounting Standards Board
(FASB), 401 Merritt 7, P.O. Box 5116, Norwalk, CT 06856-
5116; (203) 847-0700; www.fasb.org.

(1) Accounting Standards Codification (ASC) 850,
Related Party Disclosures, Updated through September 10,
2018.

(2) [Reserved]

(Approved by the Office of Management and Budget under
control number 1845-0038 10.

10. Section 668.172 is amended by revising paragraphs
(b), (c)(1), and (e) and the OMB control number at the end
of the section to read as follows:

§ 668.172 Financial ratios.

* * * * *

(b) *Ratios.* The Primary Reserve, Equity, and Net
Income ratios are defined under appendix A to this subpart

for proprietary institutions, and under appendix B to this subpart for private non-profit institutions.

(1) The ratios for proprietary institutions are:

(i) Primary Reserve Ratio

$$\frac{\text{Adjusted Equity}}{\text{Total Expenses and Losses}}$$

(ii) Equity Ratio

$$\frac{\text{Modified Equity}}{\text{Modified Assets}}$$

(iii) Net Income Ratio

$$\frac{\text{Income Before Taxes}}{\text{Total Revenue and Gains}}$$

(2) The ratios for private non-profit institutions are:

(i) Primary Reserve Ratio

$$\frac{\text{Expendable Net Assets}}{\text{Total Expenses without Donor Restrictions and Losses without Donor Restrictions}}$$

(ii) Equity Ratio

$$\frac{\text{Modified Net Assets}}{\text{Modified Assets}}$$

(iii) Net Income Ratio

$$\frac{\text{Change in Net Assets without Donor Restrictions}}{\text{Total Revenue without Donor Restrictions and Gains without Donor Restrictions}}$$

(c) * * *

(1) Generally excludes income or losses from discontinued operations under Accounting Standards Codification 205, prior period adjustments, the cumulative effect of changes in accounting principles, and the effect of changes in accounting estimates;

* * * * *

(e) *Incorporation by reference.* The material listed in this paragraph (e) is incorporated by reference into this section with the approval of the Director of the *Federal Register* under 5 U.S.C. 552(a) and 1 CFR part 51. This incorporation by reference (IBR) material is available for inspection at U.S. Department of Education and at the National Archives and Records Administration (NARA).

Contact U.S. Department of Education at: Office of the General Counsel, 400 Maryland Avenue SW, room 2C-136, Washington DC 20202; phone: (202) 401-6000;

<https://www2.ed.gov/about/offices/list/ogc/index.html?src=oc>.

For information on the availability of this material at NARA, contact the Office of the Federal Register - email: fr.inspection@nara.gov; website: www.archives.gov/federal-register/cfr/ibr-locations.html. The material may be obtained from the Financial Accounting Standards Board (FASB), 401 Merritt 7, P.O. Box 5116, Norwalk, CT 06856-5116; (203) 847-0700; www.fasb.org.

(1) Accounting Standards Update (ASU) 2016-02, Leases (Topic 842), (February 2016).

(2) Accounting Standards Codification (ASC) 205, Presentation of Financial Statements, Updated through August 9, 2021 (with taxonomy revisions as of January 26, 2022).

(Approved by the Office of Management and Budget under control number 1845-0022)

11. Section 668.175 is amended by revising paragraph (c) to read as follows:

§ 668.175 Alternative standards and requirements.

* * * * *

(c) *Financial protection alternative for participating institutions.* A participating institution that is not financially responsible either because it does not satisfy one or more of the standards of financial responsibility under § 668.171(b), (c), or (d), or because of an audit opinion or going concern disclosure described under § 668.171(h), qualifies as a financially responsible institution by submitting an irrevocable letter of credit that is acceptable and payable to the Secretary, or providing other surety described under paragraph (h)(2)(i) of this section, for an amount determined by the Secretary that is not less than one-half of the title IV, HEA program funds received by the institution during its most recently completed fiscal year, except that this requirement does not apply to a public institution.

* * * * *

